**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| In the Matter of | ) | |
| | ) | |
| Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MM Docket 92-266 |
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| | ) | |
| Rate Regulation | ) | |

# COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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**COMMENTS OF CABLEVISION SYSTEMS CORPORATION**

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits its comments in the above-captioned Notice of Proposed Rulemaking ("Notice").

## Introduction and Summary

Congress enacted the 1992 Cable Act, but it is the Commission that must now attempt to avoid the law of unintended consequences in implementing the Act's rate regulation provisions. Burdensome regulation is not only inconsistent with the statute itself, but it is also likely to have the perverse effect of reducing the quality of cable service available to the public while quite possibly leading to higher subscriber rates.

Consistent with statutory intent, the Commission should focus its efforts on ensuring that consumers have access to a low-priced package of basic cable services and the equipment used to receive such service. Basic rate regulation should be limited to the primary outlet for a single basic service tier and associated equipment. The rates for all other service tiers and

equipment ("cable programming services") -- including converters additional set converters and converters provided as part of cable programming service -- should be subject to regulation only if they significantly exceed the benchmarks for reasonableness established by the Commission. Because remote controls are generally available from third parties for purchase by subscribers, they should not be subject to rate regulation.

The "actual cost" standard governing the rates for "basic" equipment should permit recovery of a reasonable proportion of system costs, particularly construction and design costs, incurred to support subscriber equipment and drops. While this standard is applicable to the price for installation of the wiring necessary to provide service at multiple outlets and the associated wire maintenance charges, the actual delivery of programming to multiple outlets should be regulated as a "cable programming service."

The regulation of rates should be phased in over an eighteen-month period to avoid precipitous reductions in operator cash flow that could jeopardize financing. A phase-in would also help reduce operator burdens associated with the revision of charges and restructuring of service offerings necessary to comply with the new regulations. While the Commission's regulations must be in place within 180 days of enactment, there is no requirement that these regulations become effective all at once.

While imposing rate regulation on cable operators, Congress sought to ensure that operators would continue to improve the quality of programming they provide to consumers. Consumers will be assured of such quality only if operators are free to design service offerings that are responsive to subscriber demand. Cable operators must be given the flexibility to change the mix of programming on a tier or upgrade equipment on a system-wide basis without seeking each subscriber's approval, and to retier their services, so long as prices remain within the established benchmark. Services offered on a per channel or per program basis should not be subject to regulation at all, whether offered individually or as part of a package of such services.

Finally, consistent with the primacy of the franchise unit, the determination of whether a cable system faces effective competition and the evaluation of a system's compliance with the Act's "uniform rate structure" requirement should be made on a franchise-area basis.

## I. Consistent with the Statutory Intent, Basic Rate Regulation Should Be Limited to the Primary Outlet for a Single Basic Service Tier and Associated Equipment

The basic rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Act" or "1992 Cable Act") were intended to ensure that all consumers had access to a specifically-defined "low priced tier of programming."[1/]

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1/ See H.R. Rep. No. 628, 102d Cong., 2d Sess. 82 ("House Report").

The Commission's rate regulation rules must focus on that goal, rather than attempting to impose all-encompassing and burdensome rules on cable operators.[2/] Only the primary outlet for a single basic service tier and the subscriber equipment provided in connection therewith should fall within basic regulation. While the installation of the wiring necessary for additional outlets is governed by the "actual cost" standard applicable to basic equipment, the provision of cable service to multiple outlets should be considered a discretionary "cable programming service." Because subscribers can readily purchase remote control devices from third parties, the charges for remotes should remain unregulated.

### A. Only the Primary Outlet for a Single Basic Service Tier is Subject to Basic Rate Regulation

Cablevision concurs with the Commission's tentative conclusion that only a single basic service tier, as defined by

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2/ See, e.g., S. Rep. No. 92, 102d Cong., 1st Sess. 18 ("[s]uch [regulatory] oversight should be the minimum necessary to rein in . . . [cable's] market power") ("Senate Report"); House Report at 30 ("some tough yet fair and flexible regulatory measures are needed") (emphasis added).

Congress clearly would have preferred to rely on competition rather than regulation to provide a check on the rates for cable service. Communications Act of 1934, § 623(a)(2), 47 U.S.C. § 543(a)(2), as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 3, 106 Stat. 1460 (1992); see also House Report at 30 ("The Committee . . . strongly prefers competition and the development of a competitive marketplace to regulation"); Senate Report at 12 ("the Committee prefers competition to regulation").

the 1992 Cable Act,[3] is subject to basic service rate regulation.[4] While the 1992 Cable Act does not explicitly amend the 1984 Cable Act's definition of "basic cable service",[5] it clearly denominates the basic service tier as

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[3] The Commission should clarify that cable operators are not required to place foreign broadcast signals on the basic tier. Cf. 47 U.S.C. § 543(b)(7)(A)(iii) (basic tier must include "[a]ny signal of any television broadcast station that is provided by the cable operator to any subscriber"). Congress required carriage of broadcast television signals to, among other things, "serve the goals contained in section 307(b) of the Communications Act" and ensure access to local programming "critical to an informed electorate." 1992 Cable Act, § 2(a)(9), (11). Because foreign broadcast stations are not subject to the obligations imposed on U.S. broadcasters, even when they broadcast their signals into American border communities, see, e.g., In re Application for Review of McKinnon Broadcasting Co., 7 FCC Rcd 7554, 7555 (1992), carriage of such signals neither promotes the goals of the Communications Act nor provides information critical to an informed American electorate. While the Commission's rules define "television broadcast station" to include foreign stations, foreign stations are not entitled to all of the privileges accorded to a U.S. broadcaster. See 47 C.F.R. § 76.5(b) (barring foreign stations from claiming carriage or program exclusivity rights).

The Commission should also clarify that placement of foreign broadcast signals on any tier does not, by itself, subject that tier to basic service rate regulation. Even if the Commission finds that there may be multiple tiers of "basic cable service," see 47 U.S.C. § 522(3), that term is intended to include only tiers that carry those "local television broadcast signals" defined under "must carry" rules. See H.R. Rep. No. 934, 98th Cong., 2d Sess. 40 ("1984 House Report"). Congress specifically excluded foreign broadcast stations from the signals covered by "must carry" requirements. See 47 U.S.C. § 534(a), (h)(1)(A) (cable operators must carry those television broadcast stations "licensed and operating on a channel regularly assigned" by the Commission).

[4] See Notice at ¶ 13. The statute itself speaks unambiguously of "*a*" basic service tier and "*the*" basic service tier consisting of certain required components. See, e.g., 47 U.S.C. §§ 543(b)(7)(A); (b)(1), (b)(8)(A) (emphasis supplied).

[5] The 1984 Cable Act defined "basic cable service" as "any service tier" that includes local broadcast signals. 47 U.S.C. § 522(3) (emphasis supplied).

the sole focus of basic rate regulation.[6/] The judicial holding that "basic cable service" includes any tier of service that incorporated the components of basic cable[7/] is superseded by Congress' subsequent decision to limit the scope of basic rate regulation to a specifically-defined basic tier.[8/]

Consistent with the statutory focus on ensuring consumer access to a core tier of programming,[9/] rather than to every service provided by a cable operator, basic rate regulation should be limited to a primary outlet for each subscriber. Additional outlets are discretionary services not required to meet the statutory goal of an affordable "entry level" package of service and equipment. Like tiers of programming other than the

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6/ See 47 U.S.C. § 543(a)(2)(A) (authorizing rate regulation of basic cable by a franchising authority only "in accordance with the regulations prescribed by the Commission under [Section 623(b)]," which limits the scope of basic regulation to the "basic service tier" as defined therein); see also 47 U.S.C. § 543 (b)(1) ("Commission shall . . . ensure that the rates *for the basic service tier* are reasonable") (emphasis supplied); 47 U.S.C. § 543(b)(7) (defining "components of basic tier subject to rate regulation" as "*a* separately available *basic service tier*" consisting of certain statutorily-required services) (emphasis supplied).

7/ American Civil Liberties Union v. FCC, 823 F.2d 1554, 1566 (D.C. Cir. 1987), cert. denied, sub nom, Connecticut v. FCC, 485 U.S. 959 (1988).

8/ Cf. Clifford F. MacEvoy Co. v. U.S., 322 U.S. 102, 107 (1944) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling'") (quoting D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932)).

9/ See House Report at 30-33, 79 (expressing particular concern with increases in "basic" service rates).

basic tier, the delivery of service to multiple outlets should be regulated as a "cable programming service."[10/]

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[10/] Cablevision strongly supports the Commission's proposal to adopt a benchmark to govern the rates for basic service and cable programming services. See Notice at ¶ 33, 92. The benchmark for cable programming services should be set at a level that reflects the statutory intent to regulate the rates for those services only insofar as is necessary to "rein in the *renegades* of the cable industry." See 138 Cong. Rec. E1033 (April 10, 1992) (statement of Cong. Markey) (emphasis supplied). In establishing benchmarks for cable programming services, the Commission should not set a separate "unreasonable" rate for each service element. Rather, a single "bad actor" benchmark should be established for the price charged by an operator for the entire package of cable services, including basic services and equipment and cable programming services. Complaints about the rates for a specific cable programming service should be settled by comparing the operator's price for its *package* with this benchmark rate.

If the Commission adopts benchmarks based on the average of rates charged by systems facing effective competition, see Notice at ¶ 41, it should exclude from the calculation of any such benchmark the rates charged by systems facing competition from municipally-owned overbuilds. Municipal systems have several distinct advantages over private systems which allow them to charge artificially low rates. For instance, municipalities generally have access to utility poles and rights of way essential to cable television service. Because they are city-owned, municipal systems do not have to make a profit in order to stay in business. Municipal systems also may enjoy state action immunity from antitrust law enforcement. See Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). Further, the operation of municipal systems is often financed through the issuance of tax-exempt bonds and staffed by city employees. In order to compete with the low rates charged by municipal overbuilds, private systems must drop their rates to artificially low levels that do not reflect a true competitive situation.

Cablevision faces competition from a municipally-owned system in Paragould, Arkansas. That system, operated by the Light and Water Commission (CLW), is being financed through tax-exempt bonds and an increase in real estate taxes. CLW's system has been held immune from antitrust challenge. Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310, reh'g. denied en banc, No. 90 Civ. 1820EA (8th Cir., June 18, 1991), cert. denied, 112 S. Ct. 430 (1991). To match the low rates charged by CLW, Cablevision has been forced to set prices at levels that are insufficient to generate the revenues necessary for investments in new facilities and advanced technology.

### B. The Statutory Directive to Regulate "Installation and Use" of Connections for Additional Sets on an Actual Cost Basis Applies Only to the Wiring for Multiple Outlets

The 1992 Cable Act requires the Commission to use an "actual cost" basis for standards to establish the rate for "installation and monthly use of connections for additional television receivers."[11/] Clearly, this provision regulates the price charged for installation of the wiring necessary to provide service at multiple outlets and the associated wire maintenance charges. As indicated above, the actual delivery of programming to multiple outlets should be regulated as a "cable programming service."[12/]

Such a result is dictated by common experience -- consumers pay separate fees for the installation and maintenance of telephone wiring, on one hand, and the provision of telephone service -- and by reference to the statutory language and legislative history governing the "installation and use" provision. The statute itself establishes standards governing basic equipment regulation that are separate from the standards and rules for the regulation of cable services.[13/] The rate for the "monthly use" of a connection for additional sets, included under the standards for equipment, is unambiguously an *equipment* charge rather than a service charge. While "equipment"

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[11/] 47 U.S.C. § 543(b)(3)(B).

[12/] See pp. 6-7, supra.

[13/] Compare 47 U.S.C. § 543(b)(3) with 47 U.S.C. § 543 (b)(1), (c)(1).

includes wiring, it cannot reasonably be construed to include the delivery of programming: delivery of programming is a "service" provided to subscribers.

The rationale underlying the adoption of the actual cost standard -- "to prevent . . . [cable operators] from charging prices that have the effect of forcing subscribers to purchase. . . [basic subscriber equipment] several times over the term of the lease"[14/] -- is applicable to the installation and maintenance of the *wiring* necessary to bring service to additional sets, and not to the *provision of service* to multiple outlets. Congress did not want subscribers to continuously re-purchase the cable installed in their homes for additional outlets, and also sought to limit the maintenance and other charges *related to the installation of that cable*. Congress did not intend that programming costs would at some point be considered to be finally recovered, with the subscriber entitled to service for free. Service to additional outlets, like any other discretionary service, should be considered "cable programming service" and regulated as such.

### C. Only Equipment Made Available to Basic-Only Subscribers Should Be Regulated Under the "Actual Cost" Standard

The 1992 Cable Act requires the Commission to adopt standards to establish, on the basis of "actual cost," the rates charged for "installation and lease of the equipment used by

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[14/] House Report at 83-84.

subscribers to receive the basic service tier."[15/] The subscriber equipment subject to this provision should be limited to the converter (if any) and remote control unit made available to a basic service customer for use in connection with a primary outlet. Rates for converters provided for the receipt of discretionary tiers of service and any equipment provided for services received at a discretionary outlet are subject to regulation by the Commission under the standards for "cable programming service." Converters that add incremental features unrelated to the receipt of cable services, such as digital audio or facsimile capability, should be exempt from rate regulation, so long as converters without the incremental features are treated as "cable program services."

While the enacted statute applies the actual cost standard to equipment "*used*" to receive the basic service tier, rather than to equipment "*necessary*" to receive that tier, as the House bill provided,[16/] the substitution of "used" for "necessary" was intended only to "give[] the FCC greater authority to protect the interests of the consumer."[17/] Congress did not mean to

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[15/] 47 U.S.C. § 543(b)(3)(A).

[16/] See H.R. 4850, 102d Cong., 2d Sess., § 623(b)(1)(B) (1992).

[17/] H.R. Rep. No. 862, 102d Cong., 2d Sess. 64 ("Conference Report"). The Commission needed greater flexibility to ensure that the entire package of equipment made available to basic subscribers would be regulated under the actual cost standard. For example, even though the House bill specifically listed "a remote control unit" as included in the equipment "necessary" to receive the basic service tier, a literal interpretation of the word "necessary" (continued...)

sweep all rates for equipment under the actual cost standard, but simply to permit the Commission to define the appropriate scope of the statutory provisions governing the regulation of basic equipment.

To clarify the limited nature of the substitution of "used" for "necessary" in defining the scope of basic equipment regulation, the House-Senate conferees concurrently amended the definition of "cable programming service" to include the installation or lease of equipment used for the receipt of such programming.[18/] Thus, the statute explicitly provides for the regulation of equipment provided to subscribers for the receipt of service tiers other than basic under the "bad actor" test. Such a result is consistent with the statutory intent to create distinct regulatory schemes for the basic tier and other tiers of services, including the equipment provided in connection with each. To allow the actual cost standard to swallow up the rate regulation of all subscriber equipment would undermine that clear dichotomy, and create the anomalous situation in which non-basic programming tiers were regulated under a different standard than the associated equipment.

Extending the reach of equipment regulation to include converters that incorporate the functionalities of customer

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[17/](...continued)
could have precluded regulation of the cost of remotes. While remotes are "used" by subscribers to receive the basic tier, they are not "necessary" to receive any tier of service.

[18/] See Conference Report at 66.

premises equipment (*e.g.*, handsets for personal communications services, facsimile machines) will also inhibit innovation in the design and development of advanced converters. Manufacturers are far more likely to invest in the production of such devices, and operators far more likely to offer them, if they are not subject to rate regulation. The Commission long ago deregulated the offering of customer premises equipment ("CPE"), upon a finding that the marketplace was competitive. Requiring the rate regulation of converters that offer CPE capabilities, particularly where converters without such capabilities are regulated as "cable programming services," would be tantamount to the unnecessary and counterproductive regulation of CPE.

### D. The Actual Cost Standard Should Permit Recovery of System Costs Incurred to Support Subscriber Equipment and Drops

"Actual cost," the standard by which the price of equipment used to receive the basic service tier is measured, is not defined in the statute. In addition to the direct costs and indirect costs of equipment,[19/] "actual cost" should include a

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19/ For purposes of establishing the permissible rates for equipment, Cablevision supports the use of a benchmark. As in the case of cable services, operators with rates above the benchmark must have an opportunity to justify their charges. Unlike the Commission's other proposals for evaluating equipment charges, such an approach furthers the statutory goal of simplicity by eliminating the need to conduct a detailed examination of each individual operator's costs in every instance. See Notice at ¶ 66 n.95.

Cablevision urges the Commission to adopt a benchmark applicable to basic equipment *in toto*, rather than individual benchmarks for converters, remotes, drops, and wiring for additional outlets. This blanket approach would minimize (continued...)

reasonable proportion of system costs incurred to support subscriber equipment and drops. The "actual cost" of installing and connecting additional outlets, for instance, should include a reasonable allocation of the costs incurred by cable operators in designing and constructing a system capable of providing the signal level necessary to serve multiple outlets in a single location.[20/] Likewise, a portion of the costs of headend computer capability necessary to provide service on an addressable basis should be recoverable in the price for addressable converters. The cost of drops should include a proportionate share of network expenses incurred to support the drops, and an apportionment of the maintenance costs associated with drops, outlets, and equipment should be included in the calculation of "actual cost."

### E. The Charge for Remote Control Units Should Not Be Regulated

The Commission can and should decline to regulate rates for remote controls units. So-called "universal remotes" are now routinely available for purchase by subscribers throughout the country. Cablevision has configured its addressable converters

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19/(...continued)
subscriber disruptions by permitting operators to retain their current equipment price structure. Without this flexibility, an operator that imposes a separate charge for remotes but not for converters may begin collecting a converter charge to compensate for a reduction in the permissible remote fee. The amount collected by the operator may not vary substantially from current receipts, but such a change in the fee structure would needlessly engender significant customer confusion and ill-will.

20/ Cablevision engineers its systems to support an average of 2.5 outlets per home.

to work with commercially available remotes, and informs its customers in systems where it collects a separate charge for remotes of the third-party purchase option at least once every six months.[21/] Beginning in April 1994, all cable operators who offer subscribers the option of renting remotes must notify their subscribers that they may purchase a remote from a third party.[22/] With the widespread commercial availability of remotes -- and consumer awareness of their availability -- there is no justification for rate regulation of this equipment. Under these circumstances, market forces will keep the price of remotes reasonable.[23/]

A cable system need not satisfy the "effective competition" test as a condition precedent for the deregulation of remotes or any other competitively-available equipment. The 1992 Cable Act does not mandate rate regulation of equipment. Even if a system is not subject to effective competition, its equipment rates are, at most, only "subject to regulation" and then only "in accordance with the regulations prescribed by the

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21/ Two examples of Cablevision's subscriber notices explaining this option are attached hereto as Exhibit A.

22/ 47 U.S.C. § 544a(c)(2)(D)(i).

23/ Any other equipment available under similar circumstances should also be excluded from rate regulation. Likewise, if third parties offer installation and maintenance of cable home wiring, there is no justification for regulating the charges for those services. Cf. Detariffing the Installation and Maintenance of Inside Wiring (Second Report and Order), 59 Rad. Reg.2d (P&F) 1143 (1986), recon., 1 FCC Rcd 1190 (1986), partial stay denied, 2 FCC Rcd 349 (1986), further recon., 3 FCC Rcd 1719 (1988), remanded, NARUC v. FCC, 880 F.2d 422 (D.C. Cir. 1989); further recon., 7 FCC Rcd 1334 (1992).

Commission."[24/] With respect to equipment regulation, the Commission has the "authority to choose the best method of accomplishing the goals of this legislation [*i.e.*, reasonable charges],"[25/] including letting the market set the rates where possible.[26/] Congress expressly rejected the requirement of a formula for establishing equipment rates.[27/]

## II. The Commission Should Phase In Rate Regulation to Avoid Potentially Significant Financial Disruptions

The precipitous re-regulation of cable services and equipment -- particularly basic service and equipment -- could have significant adverse consequences on cable industry financing. The credit facilities that most operators rely on to finance operations and program acquisition include debt-to-cash flow covenants and interest-coverage covenants that operators must meet or fall into default. Sudden, sharp reductions in projected revenues, including revenue from the lease of equipment as well as the sale of programming services, could significantly

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[24/] See 47 U.S.C. § 543(a)(2)(A).

[25/] Conference Report at 63.

[26/] See 1992 Cable Act, § 2(b)(2) (stating the policy of "rely[ing] on the marketplace, to the maximum extent feasible"); cf. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 438-447 (1980) (deregulating carrier-provided Customer-Premises Equipment in response to competitive marketplace), modified, 84 FCC 2d 50 (1980), aff'd, sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), aff'd on second further recon., FCC 84-190 (May 4, 1984).

[27/] Conference Report at 63.

reduce cash flow to the point where the it impedes the cable industry's financing and impairs its overall financial condition.

Such a result is not in the interests of subscribers or the cable industry. A financially weakened industry will be far less likely to provide the kind of diverse programming that the public has come to expect from cable. Financial uncertainty would also drive up the cost of new financing, and could cause some lenders to cease lending to the cable industry altogether, exacerbating the current credit crunch and putting upward pressure on subscriber rates. A financially weakened cable industry will also be less able to make the infrastructure investments necessary to become a participant in the emerging competitive markets for voice and data telecommunications services. The Commission could mitigate these effects by phasing in rate regulation.

Apart from these potentially significant financial consequences, the institution of rate regulation will require cable operators to revise their rates as well as restructure their service offerings. While the burden on cable operators will be significant in any event, the costs, both financial and in terms of subscriber confusion, will be immense if operators are forced to comply with new regulations all at once.[28/]

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[28/] When the Commission revised the effective competition test under the 1984 Cable Act, a regulatory change far less significant than the re-regulation required by the 1992 Act, it provided operators six months after the release of the text of the new rules to bring their systems into compliance. Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the

(continued...)

To minimize disruption to the industry and ensure continued service to the public in the manner to which it has become accustomed, operators should be given at least eighteen months to bring their rates into compliance with the new rules. The Act does not require that rates be "reasonable" as of a date certain. Rather, it requires only that the Commission's regulations ensuring reasonable rates for basic tier service and preventing "unreasonable" rates for cable programming services are in place within 180 days of enactment.[29/] The content of these regulations is left to the Commission, which is allowed broad discretion to determine the most appropriate method of accomplishing reasonable rates.[30/] Given the flexibility conferred upon the Commission and its obligation to reduce the burdens on cable operators, it clearly has the authority to adopt a phase-in and should do so.[31/]

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[28/](...continued)
Provisions of the Cable Communications Policy Act of 1984 (Second Report and Order), 3 FCC Rcd 2617, 2625 (1988); cf., e.g., In the Matter of Amendment of Part 15 to Redefine and Clarify the Rules Governing Restricted Radiation Devices and Low Power Communication Devices, 79 FCC 2d 67, 73 (1980) (providing phase-in periods for new rules governing equipment).

[29/] See 47 U.S.C. § 543(b)(1)-(2), (c)(1).

[30/] See Conference Report at 62-63 (stating that the Commission is given authority to select the best means of ensuring reasonable rates for basic services and equipment).

[31/] See Notice at ¶ 143 ("while our regulations must be in place 180 days from the date of enactment, the statute does not require that all implementing steps that cable systems must take to meet the obligations of the statute or our rules must be completed on that date").

(continued...)

## III. Cable Operators Must Continue to Have Flexibility in the Design of Service Offerings

One of the major purposes of the 1992 Cable Act is to ensure that cable operators continue to improve the quality of programming they provide to consumers.[32/] In order to provide top quality service to consumers, cable operators must be free to design packages or tiers of services that respond to subscriber demand. The Act's requirements governing negative option billing and retiering must not be allowed to interfere with that goal. The Commission must also give full effect to the statutory provision completely exempting from regulation any programming offered on an "a la carte" basis, even if also offered on a packaged basis.

### A. The Prohibition on Negative Option Billing Does Not Apply to a Change in the Composition of a Tier or a System-Wide Upgrade if the Rates for Service or Equipment Remain Within the Benchmark

Cablevision supports the Commission's tentative decision to exclude changes in the number or mix of programming services on a tier from the prohibition on negative option billing.[33/] The negative option restriction "is not intended to apply to changes in the mix of programming services that are included in various

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[31/](...continued)
Although it appears that a cable operator's rates become subject to regulation 180 days after enactment, see 1992 Cable Act, § 3(b), such regulation takes place only in accordance with the Commission's regulations. See 47 U.S.C. § 543(a)(2).

[32/] See 1992 Cable Act, § 2(b)(3) (stating the policy of "ensur[ing] that cable operators continue to expand. . . the programs offered over their cable systems").

[33/] See Notice at ¶ 120.

tiers of cable service."[34/] Adoption of the proposed rules will avoid harming subscribers by preventing a "stalemate" in service offerings.[35/]

The Commission must also clarify that *any* change in the mix of programming, *i.e.*, an addition *or* a deletion, is exempt from the ban so long as the price for service remains within the applicable benchmark. Subscribers benefit from the deletion of an unwanted service as much as they do from the addition of a desired service. At the same time, they suffer no harm as long as the tier price stays at the appropriate benchmark level.

Cablevision also supports the Commission's conclusion that the negative option billing provision does not apply to system-wide upgrades in equipment that result in a price increase that is justified under the Commission's rate regulation standards. Requiring cable operators to contact each subscriber before making a system-wide upgrade would serve only to prevent such improvements. Such a result would undermine the national goal of encouraging the deployment of an advanced telecommunications infrastructure, and would contradict the Act's policy of encouraging cable operators to "expand, where economically justified, their capacity."[36/]

### B. A Cable Operator's Ability to Retier Services Must Not Be Unduly Restricted

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[34/] Conference Report at 65.

[35/] See Notice at ¶ 120.

[36/] See 1992 Cable Act, § 2(b)(3).

The 1984 Cable Act permits an operator to move services from one tier to another, without permission of the franchising authority, if the rates for all of the affected tiers are not "subject to [rate] regulation."[37/] The 1992 Cable Act subjects all tiers of service on most systems to some form of regulation, seemingly nullifying that provision. Nonetheless, other provisions of the 1984 Cable Act that were not amended last year permit an operator to retier without the prior approval of the franchising authority (between regulated tiers or between a regulated and an unregulated tier) so long as the franchise does not specify a particular tier for the category of service that the operator proposes to move.[38/] The Commission has already suggested that operators retain the authority to retier under those conditions, even if one or both of the affected tiers are subject to rate regulation.[39/] The Commission should reaffirm this holding to avoid any confusion as to the scope of an operator's retiering rights in the wake of the broader rate regulation requirements in the 1992 Cable Act.

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[37/] 47 U.S.C. § 545(d).

[38/] See 47 U.S.C. § 545(a)(1)(B) (requiring the operator to get franchising authority for modifications of the franchise's "requirements for services", implying that no such approval would be necessary in the absence of such requirements).

[39/] Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service, 5 FCC Rcd 259, 265 (1990) (Notice of Proposed Rulemaking); 6 FCC Rcd 4545, 4564 n.111 (1991) (Report and Order and Second Further Notice of Proposed Rulemaking).

Cablevision also supports the Commission's proposal to hold that certain instances of retiering[40/] would not be deemed to be prohibited "evasions" of the rate regulation provisions of the 1992 Cable Act.[41/] In proscribing "evasions that result from retiering," Congress was concerned about retiering undertaken in an effort to avoid the rate regulation requirements of the Act.[42/] So long as a cable operator complies with the basic service tier requirements and keeps its rates for services and equipment within the applicable benchmarks, there is no reason to inhibit or impede retiering.

### C. Any Programming Offered on an Unbundled Basis is Exempt From Rate Regulation

To enhance subscriber choice and promote competition among programming services, Congress exempted from rate regulation "video programming offered on a per channel or per program basis."[43/] Congress reasoned that unbundling enhances subscriber choice by permitting consumers to pay only for that programming they wish to view, and promotes competition among

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[40/] See Notice at ¶ 127 ("[r]etiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change that complied with [the Commission's] rate regulations").

[41/] See 47 U.S.C. § 543(h).

[42/] See Conference Report at 65.

[43/] Senate Report at 77.

programmers by forcing them to offer a product that will be demanded on a stand-alone basis.[44/]

The "per channel or per program" exemption applies to any programming offered on a stand-alone basis, and not just to so-called "premium" services. The terms "per channel" and "per program," specifically used in the statute, include all "a la carte" services.[45/]

The Commission must ensure that its rules destroy neither the incentives nor the opportunities that the Act gives to cable operators to unbundle their service offerings. Thus, the exemption should be interpreted to include any re-aggregation or packaging of any programming that is also offered on an "a la carte" basis. The plain language of the statute exempts from regulation "video programming offered on a per channel or per program basis."[46/] The language does not limit the exemption to programming "offered only" on such a basis. As long as all programs in a package are available on an unbundled basis, there is no need to regulate the rate for that package. Consumers remain free to choose only those services they wish, without purchasing the package, leaving operators with little or no

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[44/] Senate Report at 76-77; see also House Report at 89-90.

[45/] See House Report at 80 ("under the Act, services offered on a stand-alone, per-channel basis (premium channels like HBO and Showtime) *or other programming that cable operators choose to offer on per-channel or pay-per-view basis* are not subject to rate regulation") (emphasis supplied). But cf. Notice at ¶ 96 (suggesting that "per program" services are synonymous with "premium services).

[46/] 47 U.S.C. § 543(l)(2)(B) (emphasis added).

ability or incentive to charge an unreasonable or excessive price for the package.[47/]

Finally, the Commission should clarify that subscription to the basic service tier is not required in order to purchase programming on an "a la carte" basis.[48/] Such a policy is wholly consistent with the plain language of the statute, which requires only that the basic tier be subscribed to in order to access "any other tier of service."[49/] By permitting cable operators to make "a la carte" offerings widely available to consumers, the Commission would further the legislative goal of enhancing subscriber choice.

## IV. Determinations With Respect to Effective Competition and Uniform Rate Structures Should Be Made on a Franchise-Area Basis

The 1992 Cable Act designates the franchising authority as the regulator of basic cable rates and the franchise area as the

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47/ For the same reason, it is irrelevant whether or not the package price is the sum of the charges for each separate programming service or some amount greater or lesser than the sum. See Notice at ¶ 96.

48/ Where Congress wished to prohibit buy-through requirements, it did so explicitly. See 47 U.S.C. § 543(b)(8)(A). Here, Congress neither prohibited nor required the "buy-through" of the basic service tier as a condition of access to per program offerings.

49/ 47 U.S.C. § 543(b)(7)(A) (emphasis supplied). Had Congress intended to require a subscriber to purchase the basic service tier as a condition of access to "a la carte" offerings, it presumably would have stated explicitly that subscription to the basic tier is required for access to "programming offered on a per channel or per program basis." Elsewhere in the statute that phrase is used specifically to identify "a la carte" offerings. See 47 U.S.C. § 543(b)(8)(A), (l)(2)(B).